



State of Utah

GARY R. HERBERT

Governor

SPENCER J. COX

Lieutenant Governor

TODD E. KISER

Commissioner

Insurance Department

State of Utah Title & Escrow Commission Meeting Meeting Information

Date: August 14, 2017

Time: 9AM

Place: East Building, Copper Room

MEMBERS

COMMISSION MEMBERS

xChair, Alison McCoy (*Agency, Tooele County*) xNancy Frandsen (*Insurer, Salt Lake County*)
xVice Chair, David Moore (*Agency, Salt Lake County*) xJames Swan (*Insurer, Salt Lake County*)
xSylvia Andersen (*Public Member, Salt Lake County*)

DEPARTMENT STAFF

Todd Kiser, *Ins. Commissioner* xBrett Barratt, *Deputy Comm.* xPerri Babalis, *AG Counsel - TEC*
xSuzette Green-Wright, *MC Dir.* Randy Overstreet, *Licensing Dir.* Reed Stringham, *AG Counsel - UID*
xAngie Watson, *Examiner* xAdam Martin, *Examiner* xSteve Gooch, *PIO Recorder*

PUBLIC

Blake Heiner Robert Williams Frank Medina
Jim Johnson Tammy Greening Wes Jensen [PHONE]
Jennifer Corbin [PHONE] Glen Gooch [PHONE] Bob Rice [PHONE]

MINUTES — *Approved*

General Session: (Open to the Public)

- **Welcome** / Alison McCoy, Chair (9:01 AM)
 - Commissioner Kiser is excused.
 - Reed Stringham is excused.
- **Telephone Roll Call**
- **Adopt Minutes of Previous Meeting**
 - **Motion by David to adopt minutes. Seconded by James. Motion passes 4-0.**
- **Reports**
 - Concur with Licensee Report / Angie
 - There was 1 new agency license, no lapsed licenses, and no reinstated licenses.
 - There were 4 new individual licenses, several lapsed licenses, and 5 reinstated licenses. Some of the reinstated licenses had been lapsed for quite a while. Letters will be sent to them to find out what kind of business was done during the lapse.
 - **Motion by James to concur. Seconded by David. Motion passes 4-0.**
 - Concur with Complaint & Enforcement Report / Angie
 - There were 4 that were still open at the end of July. Some were in regard to escrow funds, and one was for alleged unlicensed activity.
 - Several cases were opened and closed in July. They were for alleged unlicensed activity and escrow funds.
 - David notes that all closed cases were not violations, which is good.
 - Angie says 13 cases were opened in July, and 9 were closed. For the year, there have been 86 opened and 81 closed.
 - There were no new complaints, but ENF #3822 was closed. It will be discussed later.
 - **Motion by Nancy to concur. Seconded by David. Motion passes 4-0.**

- Request for Dual Licensee Expedited Request: None
- Request for Attorney Exemption:
 - There was a request for attorney exemption, but it did not make it to the agenda. It needs to be rescheduled to comply with Open Meeting rules.
 - **The Title & Escrow Commission will hold a teleconference on August 17 at 3:00pm.**
- **Administrative Proceedings Action / Lisa Watts Baskin, ALJ**
 - Stipulation and Order:
 - Juab Title & Abstract Co. (ENF #3822)
 - Juab Title & Abstract Co. violated the inducement act (31A-23a-402), as well as two insurance rules. R592-6-4(21)(a) prohibits title services from being entered into where one or more of the producers will be providing financing for the real estate transaction; the fine for this violation is \$5,000. R592-6-4(10) prohibits cohabitation of a title producer with other entities, including realtor and mortgage lender; the fine for each of the three violations is \$5,000. The total fine amount is \$20,000.
 - The AG worked with Juab Title's attorneys to arrive at the \$20,000 agreed-upon amount.
 - Because 3 members are new, Alison asks what the TEC's responsibility is with stipulation and orders. Perri says the TEC may only concur with the penalty, not the findings or conclusions.
 - Robert Williams is one of the complainants, and he asks if the TEC has the power to increase the fine. Perri says if the TEC disagrees with the fine, they can send it back to the commissioner asking for a new penalty. The TEC can also submit a recommended penalty to the commissioner. Ultimately the TEC and commissioner must reach agreement. Brett says the idea is that neither side can make unilateral decisions. If there's a deadlock, the commissioner has ultimate authority to make a decision.
 - Nancy asks if it's possible to find out how the UID came up with the fine amount. Brett says it's included in the Insurance Code: the maximum penalty for an individual is \$2,500 per violation, and for an underwriter or agency is \$5,000 per violation. Brett notes that this was a negotiation, and based on the findings it's the maximum penalty for the violations.
 - David asks if there's a penalty for profits earned. Brett says there is, and it is up to twice the amount of profits earned, but the UID hasn't used it recently. Suzette says it has been used maybe once in the past 23 years.
 - Robert notes that Juab has loaned more than \$6.7 million, and Richard Sperry is also the Juab County recorder and he forces business to Juab Title. Robert says Sperry was found guilty of an ethics violation for failing to disclose. In that light, \$20,000 is like a traffic ticket — it's a cost of doing business. Robert says the county commission didn't take action to remove Sperry from office and Sperry now thinks he has carte blanche to keep doing this. How will the supervision work on the UID's end?
 - Brett notes that whatever the county commission did or didn't do is outside the UID's purview. However, he notes that Juab Title has agreed not to do this in the future. If they were to do it, the penalties would be very aggressive because they would be violating state statute and an order of the commissioner.
 - Angie says the probation for 24 months, and the UID will be checking in regularly.
 - Sylvia says one of the things the TEC changed on the Enforcement report is the ability to see problem children. She says the TEC would like the probation to be more strictly followed. Juab Title needs to know they're being watched and are not above the law. They need to correct and change their behavior.
 - Jennifer Corbin asks if the fine is \$5,000 per violation or \$5,000 for all the violations. Brett says it appears to be one fine for all the violations. He wasn't involved in the investigation and negotiation, but he suspects the UID and AG looked at the facts and proof they had and what they could win, and that likely played into the negotiated offer.

- David notes that 2 points in the complaint were dismissed. If he understands the complaint, the company cohabitated with its own companies, one of which was a mortgage company, which could be controlled business. Angie explains that it wasn't a mortgage company, it was more of a lender. David asks if that's a violation of controlled business. Brett says it would depend on the facts. David asks if one of the dismissed complaints was for controlled business. Angie says it was not.
 - **David moves to concur. Sylvia seconds. Motion passes 5-0.**
- Order to Show Cause: None
- Informal Adjudicative Proceeding and Order: None
- Notice of Formal Adjudicative Proceeding: None
- **Board Duties & Responsibilities / Perri**
 - The Title & Escrow Commission is a public body, and all business must be conducted in an open manner so the public can participate.
 - All meetings must be given public notice at least 24 hours before the meeting, and the agenda must specify the date, time, and place of the meeting, as well as the items that can be discussed. Items not on the agenda can be mentioned, but cannot be discussed.
 - Public bodies can convene an electronic meeting (such as a teleconference), but the Title statute says the TEC must meet in person for the monthly meeting and cannot participate electronically for the monthly meeting. Electronic meetings can be held for additional meetings called by the chair. Brett notes that TEC members can call into a monthly scheduled meeting, but they cannot vote.
 - Meeting minutes and recordings must be taken and posted publicly. Approved minutes must be made available within 3 business days after approval.
 - Public bodies may hold closed sessions only for specific reasons. For title, this includes a couple of options: a human person's character, competence, or health; pending or imminent litigation; or investigation of criminal conduct. Meetings may only be closed by a 2/3 vote and with a quorum present. The TEC must also say why the meeting is being closed.
 - Emergency meetings do not require 24 hours notice.
 - Violating the Open Meetings Act could be a class-B misdemeanor.
 - The handbook in each TEC member's packet includes parliamentary procedure and general meeting notes.
- **New Business**
 - DRE's new REPC addendum / Alison
 - The Department of Real Estate's new REPC goes into effect on Sept. 1, 2017 and will be required on Jan. 1, 2018. The DRE's website has a blue-lined copy that includes changes.
 - Section 4.3 gives permission to withhold money from seller's proceeds to pay their debts, now says parties will pay their respective fees, and says who will pay transfer fees between buyer and seller. Several sections talk about what happens when earnest money becomes nonrefundable. The section that talks about escrowing funds for repairs has been removed.
 - David says his concern is that agents rely on the REPC as written escrow instructions. When holding earnest money, agents need to be very careful when releasing funds. People need to know that this is an agreement that agents follow, but agents are not and cannot be a party to it.
- **Old Business**
 - Rulemaking authority with regard to escrow issues / Perri/Reed
 - The question being answered is whether the TEC has legal authority to enact a rule requiring that a title company conducting escrow enter into a written agreement with parties to the real estate transaction that is the subject of the escrow.
 - In researching this issue, the AG has determined that TEC has authority to enact rules, but the powers are limited. 31A-2-404(2)(a) says the TEC shall make rules for administrating title related matters including rating standards and methods, licensing for a licensee, continuing education requirements, and standards of conduct for a licensee.

- The definition of "escrow" in 31A-1-301(60) is "a transaction that effects the sale, transfer, encumbering, or leasing of real property, when a person not a party to the transaction, and neither having nor acquiring an interest in the title, performs, in accordance with the written instructions or terms of the written agreement between the parties to the transaction [...] the receipt, deposit, and disbursement of money."
- The AG's opinion is that, under this definition, the TEC has authority to enact escrow rules when the title company is not party to the agreement.
- Because this first proposed rule would make the company a party to the agreement, the rule would not be for the administration of the purposes of Title 31A and would not be related to an escrow conducted by a title company. The AG's opinion is that the TEC does not have authority to enact a rule requiring such an agreement.
- David says as he looks at the definition, all title companies have written escrow agreements. Title 7 has a section about independent escrows, which says escrow instructions can be either expressed or implied. The question has been raised whether that applies to title companies. There was a past court case — *Cooper v. Brighton Title* — where the ALJ used the definition under Title 7, not Title 31A, which caused some questions. David says a title company can never be party to the REPC, but there needs to be a separate agreement. It's become commonplace for the title industry to hold earnest money. If they're acting as an escrow and holding money, they must have instructions. The issue is that it's fine when the deal goes through cleanly, but when the transaction fails, escrows are now holding earnest money without instructions. There are times when people disagree about who gets the money, and the escrow is put in a problematic position.
- Alison clarifies that the current options are either 1) the industry self-regulates or 2) must pursue a legislative change. Perri says the AG's recommendation is a legislative fix.
- David asks if the TEC can make a rule that sets forth escrow instructions. Perri says enacting a rule like that goes beyond the statute. Rules can't create new laws, which is where this seems to be headed.
- Sylvia has spoken with a state senator to whom both the DRE and TEC report. He is in favor of a quarterly joint meeting between the two bodies. He may require it and require the results of that meeting be sent to him. Sylvia suggested to the senator that the DRE commission should have a public member, and he agreed. Sylvia believes the answer to the issues is getting both commissions together to understand the needs of each
- Nancy notes that if the TEC does a rule, then the UID has to enforce it. Any rules that are made need to not be a burden on the UID.
- Alison notes that there's a REPC addendum out there that has not been approved. It says who has the earnest money, as well as a note that includes language about how money should be disbursed. It notes that the DRE has no authority over title companies. The next step is for the TEC to get with the DRE to see what they can add to it.
- Nancy asks if the buyer and seller are signing the agreement, do we still feel that best practices are to get additional instructions signed by the buyer and seller? James says there's a section about making a company whole if there's a disagreement. He thinks being reimbursed for costs and expenses is key for a title company to hold earnest money.
- Perri says it is important for the TEC or ULTA to go to a DRE meeting, so they can tell the decision makers that the title industry has a problem with it.
- Alison asks about 406 and money held in escrow — does it preclude escrows from taking fees out of the earnest money for administrative purposes? Perri says yes, 406 says that fees cannot be taken out of the earnest money unless there are written instructions.
- Alison asks if the UID would be interested in sending out a bulletin to make people aware of this issue. Brett says it's possible, and the UID will have a draft ready next month.
- Nancy asks what the percentage is of transactions where the earnest money is being held with the title company. She asked around and found a higher frequency than expected of the realtor still

holding the money. She asks if the TEC wants to make a rule for something that only happens sometimes.

- Alison will get with the DRE to make sure this issue gets discussed.
- Perri reads the other AG opinion regarding whether the TEC can enact a rule to require parties to a real estate transaction to hold title companies harmless. The AG's analysis is that such a rule would be contrary to the scope of 31A-23a-407.
- Out-of-state/unlicensed escrow companies / Alison
 - There are only 4 escrow-only companies licensed in Utah. The concern is whether a title company issues escrow on an out-of-state transaction, would there be problems?
 - David notes that those 4 companies are licensed under the Department of Financial Institutions. If a title company from Ohio Title is closing on Utah property and just wants David to do the title insurance, is that a problem? Does a transaction involving Utah property require a Utah-licensed escrow agent? Brett asks if a title company can only do escrow if it issues a policy. Alison says yes, and David notes that most states don't license escrow.
 - Blake Heiner asks what happens when a local lender does their own closing. He thinks this discussion is creating a question where there really is none.
 - Sylvia asks if a Utah company can legally do business with an out of state company that is acting illegally. She doesn't think they can without putting themselves in a vulnerable situation.
 - James says Utah law doesn't govern what an Ohio company can or cannot do. Sylvia says we have requirements for operating in Utah. Blake says they wouldn't be doing business in Utah if they don't issue the policy — it's just the property that's in Utah.
 - Nancy thinks the residency requirement came from a UID bill, so any other requirements should be added to a UID bill during a legislative session.
 - James asks what constitutes "doing business in Utah." An out-of-state company would argue vehemently that they're not doing business in Utah — they're conduct their escrow in their own state. The TEC needs to carefully consider the pros and cons when creating regulations. If we take a protectionist approach, the pro is that it could be a boon to Utah title producers; the con is that this is the direction real estate commerce in the country is going — what effect would a new regulation have on entities trying to do business in Utah? Another con is that it runs contrary to the general laws of commerce. It comes down to whether it's easy to do business in Utah or hard to do business in Utah. We need to look at the consequences.
 - Sylvia appreciates James' comments but notes that they didn't concern the consumer. It would be hard for a consumer to get their escrow money back from ten thousand miles away. Fraud is easier when you have no state protections and the business is done by unknown people in no physical office. We need to carry the torch for the consumer to make sure they are protected if a digital company is doing business in Utah. If we take care of the consumer, good business practices will follow.
 - David agrees, but says that everything is going national. In Utah we license escrow, but most other states don't. The consumer isn't being protected if they're dealing with an out-of-state company that isn't licensed for escrow. Blake says if a consumer chooses to do escrow with an out-of-state company, that's their choice. Most out-of-state transactions are done by national business customers, not everyday consumers buying a house. These entities have attorneys who have covered everything across the country. Sylvia disagrees and notes that there are websites that advertise mortgages to normal people. How are Utahns protected from these digital companies that offer mortgages and loans online? Blake says the question is how the loans are closed, but he suspects they retain someone local.
 - Blake says if an out-of-state entity contacts a Utah title company to provide title services, is that illegal. Blake says emphatically no. Brett notes that the UID would take a different view of that because it's implied that there's a Utah property involved. If someone out of state takes escrow money, the UID would have no way to help them. Blake asks if that title company would be in violation of the law if they provide title services; also would the UID tell a national company with

sites all over the world, that they would have to hire a Utah title company. Brett says based on his familiarity with Utah laws, yes.

- Suzette says 31A-14-211(2) has restrictions on foreign insurers. The UID has used that statute a lot for getting people into compliance. It requires a bona fide office in Utah.

- **Other Business**

- **Hot Topics**

- Nancy and Alison will attend the PSI Testing Review on August 15. There's an open meeting on August 17 at 1pm if anyone wants to attend.
- The UID has received 4 applications for the TEC's general public member position.

Executive Session (None)

- **Adjourn** (10:24 AM)
 - **Motion by Sylvia to adjourn. Seconded by David. Motion passes 5-0.**
- **Next Meeting: September 11**, 2017 — Copper Room

2017 Meeting Schedule in Copper Room

Jan 9	Feb 13 (SOBB110)	Mar 13	Apr 3	May 8	Jun 12
Jul 10	Aug 14	Sept 11	Oct 2	Nov 13	Dec 11